Eastern District of Louisiana, which determined that the captains and crewmen were not employees for the purposes of the FICA and FUTA taxes (R. 334–336). The district court observed that the applicable statutes provided that the "usual common law rules" applicable to the determination of the master-servant relationship governed who has employee status. It rejected the government's contention that the common law governing the relationship of boat owners and their captains and crews was the general maritime law. (R. 335–336.)

On the government's appeal, the Court of Appeals for the Fifth Circuit affirmed the district court, holding that the statutes' prescription of the usual common law rules barred application of principles of maritime law. However, the court stated that were it free to apply maritime law, it would reverse the district court because it was clear "that under maritime law the captain is the agent of the owner * * * and the crew hands are employees." (Pet. App. 6a.)

This Court granted certiorari and held (397 U.S., p. 194) that the court of appeals "erred in declining to judge the status of the captains and crewmen against the standards of maritime law." The Court reversed the judgment and remanded the case to the court of appeals for proceedings consistent with its opinion.

On remand, the court of appeals incorporated its earlier conclusion that under maritime law the captain is the agent of the owner and crew hands are employees. It denied petitioners' request for further

proceedings and remanded the case to the district court with instructions to dismiss the complaints. (Pet. App. 9a–10a.) Subsequently, the court of appeals denied petitioners' petition for rehearing (Pet. App. 11a).

ARGUMENT

The decision below is correct. There is no conflict of decisions or any other reason for further review by this Court.

Petitioners argue (Pet. 2) that the court of appeals failed to follow this Court's mandate by instructing the district court to dismiss the complaints rather than to consider a motion for a new trial. We submit that the crucial issue in this case has been resolved, as evidenced by the plain meaning of this Court's opinion and the original decision of the court of appeals. No issues of fact remain to be tried, and no new issues arose as a result of this Court's decision. The court of appeals had no reason to further protract the case by directing a new trial, and it correctly instructed the district court to dismiss petitioners' complaints.

1. The dispositive issue here is whether standards of maritime law, as distinguished from land-based standards, are applicable in determining the employee status of the captains and crews for the purposes of the FICA and FUTA. Initially, the court of appeals held (Pet. App. 6a–7a) that Congress did not intend the "usual common law rules" to embrace general principles of maritime law. The court nevertheless stated that (Pet. App. 6a) "If we were free to apply

"maritime law as a test of the employer-employee relationship, we would reverse the decision of the district court * * * because it is clear that under maritime law the captain is the agent of the owner (on the facts here) and the crew hands are employees."[2] This Court then held (397 U.S., p. 194) that the court of appeals had erred in declining to judge the status of the captains and crews against maritime law standards and remanded the case to the court of appeals for proceedings consistent with the opinion. This holding, coupled with the earlier conclusion of the court of appeals that the captains and crewmen were employees under maritime law, leaves no room for further argument as to the appropriate disposition of this case.

The mandate and opinion of this Court in no way suggest that further trial proceedings were required or necessary. The case could have been remanded with instructions to the court of appeals to order further proceedings in the district court. However, this Court chose to make a general unqualified remand and to leave the disposition of any remaining issues in the hands of the court of appeals. Only one question was

[2] This Court referred to the conclusion of the court of appeals and stated (397 U.S., p. 182, n. 4): "We are not called upon to, and do not, intimate any view on the correctness of the Court of Appeals' statement on this score." Petitioners characterize (Pet. 5) this statement as a "rejoinder," whereas the Court very clearly was expressing no opinion. The Court certainly did not intimate that the court of appeals was in any way precluded from reaching such a conclusion on the basis of the factual findings of the district court.

left for resolution—namely, whether the captains and crewmen had the status of employees under standards of maritime law. This was basically a question of law, requiring application of an appropriate legal standard, decided by this Court, to underlying facts already ascertained by the district court.[3] No question of intent or other subjective factor was pertinent. In such a posture, the case was particularly suited to plenary appellate consideration on remand.

The underlying facts bearing on the employer-employee relationship had been fully developed at the trial level, as the court of appeals observed in its first opinion when it stated (Pet. App. 7a): "The district court delineated with some elaboration the relationship between the owners and the captains and crewmen." These facts and circumstances—the terms and conditions, and the rights and responsibilities that the owners, the captains and the crews received or owed in relation to one another—were essentially undisputed. The findings were reached on the basis of a lengthy stipulation, depositions, and oral testimony which was free of significant contradiction. In addition, throughout the course of the trial proceedings, petitioners were well aware of the government's claim

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[3] Petitioners' contention (Pet. 11) that the employee status of fishermen under the FICA and FUTA is a question of fact is not in accord with the very cases upon which they rely. Neither in the Court's opinion in this case, nor in *Enochs* v. *Williams Packing Co.*, 370 U.S. 1, is there any intimation that the ultimate question is purely one of fact. See also this Court's analyses in *United States* v. *Silk*, 331 U.S. 704, and *Bartels* v. *Birmingham*, 332 U.S. 126.

that maritime law standards should govern here.[4] Petitioners had every opportunity to explore and adduce evidence peculiarly relevant to maritime law. If, for some reason, they failed to draw upon certain sources of information at that time, they can hardly come forward at this late hour and request a new trial to fill in their gaps of proof.

2. The court of appeals correctly concluded that, applying traditional maritime law principles to the facts here, the captains and crewmen were employees of petitioners. Under settled principles of maritime law, the boat owner owes the obligations of an employer to his captain and crew unless the master of the vessel has become an owner *pro hac vice* by a demise charter. See, *e.g.*, *The Norland*, 101 F. 2d 967 (C.A. 9); *Cromwell* v. *Slaney*, 65 F. 2d 940 (C.A. 1); *The Carrier Dove*, 97 Fed. 111 (C.A. 1). For a demise charter to exist, the owner must surrender the entire possession, control and navigation of the vessel. *Peters* v. *Rohrman*, 272 Fed. 338 (D.N.J.). Anything less than a transfer of the entire possession, control and navigation does not amount to a demise charter.[5]

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[4] The government's position was made clear as early as the pretrial order, which stated under the heading of contested issues of law (R. 51–52):

> The Defendant says: the sole issue is whether the terms upon which the menhaden boats were to be fished by the captains amounted to an agreement of employment according to the general maritime law between the plaintiffs and fishermen.

[5] For example, for purposes of claiming compensation under the Jones Act (The Merchant Marine Act of 1920, c. 250, 41 Stat. 988, Section 33 (amending Section 20, Act of March 4,

The findings of the district court clearly establish that the arrangement between petitioners and their captains and crewmen did not constitute a demise or bare-boat charter, for none of petitioners chartered a vessel to a captain for a full season (R. 127). More conclusive, however, is the fact that the captains were obliged to return their catch to processing plants designated by, and for the account of, petitioners (R. 317–318, 320–321). It is difficult to comprehend how a new trial could or should change these undisputed facts.

Nor are any further proceedings necessary to retry the issue of control in light of the applicability of maritime law. Petitioner correctly states (Pet. 8) this Court's observation that control is probably the most important factor under maritime law, just as it is under the tests of land-based employment. However, the Court went on to state (397 U.S., p. 192) that "except where there is nearly total relinquishment of control through a bare-boat, or demise, charter, the owner may nevertheless be considered, under maritime law, to have sufficient control to be charged with the duties of an employer." The record is not "bare," as petitioners suggest (Pet. 10), of any evidence of control. Indeed, the record is replete with evidence that petitioners retained sufficient control to be charged with

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1915, c. 153, 38 Stat. 1164 (46 U.S.C. 688)) or determining liability under the doctrine of *respondeat superior*, fishermen are held to be employees, unless the boat is held under a demise charter. See, e.g., *Justillian* v. *Versaggi*, 169 F. Supp. 71 (S.D. Tex.); *Southern Shell Fish Co.* v. *Plaisance*, 196 F. 2d 312 (C.A. 5); *The Barnstable*, 181 U.S. 464.

the duties of an employer. Given the detailed findings of the district court, the court of appeals was no less equipped than a trial judge to conclude that under the facts here, there was not a total relinquishment of control and the captains and crewmen had the status of employees.

3. Petitioners' final contention (Pet. 12–13) is that the effect of this Court's opinion was to integrate the common law rules embraced in the FICA and FUTA into the maritime law. As a result, they submit, a new definition of "employee" has been added to maritime law which apparently gives rise to new issues of fact.[*] This Court did not add a new definition of "employee" to maritime law. It did just the reverse by concluding that in determining the employee status of captains and crewmen, the usual common law rules referred to in the FICA and FUTA incorporated by reference the rules of maritime jurisprudence—specifically the rules which determine whether one has the duties and responsibilities of an employer. 397 U.S., pp. 191–192. The court of appeals acted precisely in accordance with this Court's mandate. It judged the status of the captains and crews against the maritime decisional law de-

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[*] Petitioners' reliance (Pet. 12–13) on this Court's decision in *Panama R. R. Co.* v. *Johnson*, 264 U.S. 375, is misplaced. In that case, the Court held that Congress had the power to enact legislation affording seamen certain rights against shipowners with respect to injuries sustained while at sea, even though these rights and liabilities were also within the reach of preexisting maritime law principles. Here, on the other hand, the Court was not supplementing or altering maritime law, but rather authorizing its applicability in analyzing the employer-employee relationship under the FICA and FUTA.

fining the employer-employee relationship and properly concluded that the captains and crew hands here had the status of employees.[7] It did not bypass any new issues of fact, for no such issues arose on remand.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[7] On remand the court of appeals was incorporating conclusions in its earlier opinion, where it stated (Pet. App. 5a–6a):

> In non-tax context when courts are asked to determine whether seamen are employees of the vessel's owner, all ambiguities or doubts are resolved in favor of the seamen. Today, the law is clear that in both categories of cases—Jones Act, and maintenance and cure—the owner of the vessel is the employer unless the vessel is held under a demise charter.

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